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ABSTRACT

Developed to help library media personnel, administrators, and educators understand and work with the copyright law as it applies to videotape and microcomputer software, this handbook provides: (1) an overview of copyright, including rights granted to copyright holders and libraries and court interpretation of the copyright law; (2) suggestions for ways that libraries can avoid copyright liability; (3) remedies if a library is sued for copyright infringement; (4) a discussion of issues related to microcomputer software copyright, including "shrink wrap" license agreements, archival copies of programs, and suggestions for avoiding liability; and (5) a discussion of issues related to videotape copyright, including performances of commercial videotapes, off-air recording by educators, and suggestions for avoiding liability. Questions about software and videotape copyright asked by Kansas librarians are answered, and suggestions for developing a library copyright policy and for writing for permission for circumstances beyond fair use are included. The International Council for Computers in Education 1987 Policy Statement on Software Copyright and Congressional guidelines for off-air taping of broadcast television programs are appended. (10 annotated references) (MES)

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COPYRIGHT HANDBOOK FOR VIDEOTAPES & MICROCOMPUTER SOFTWARE

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COPYRIGHT HANDBOOK FOR VIDEOTAPE AND MICROCOMPUTER SOFTWARE

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INTRODUCTION

COPYRIGHT HANDBOOK FOR VIDEOTAPE AND MICROCOMPUTER SOFTWARE

This handbook has been developed to help library media personnel, administrators and educators begin to understand and work with the copyright law as it applies to videotape and microcomputer software. For the new, evolving technologies, the law has many gray areas. Many questions will not be answered until future court cases are decided. At present, interpretations may vary widely and local legal counsel should be sought if serious copyright questions arise.

The educational and library communities are responsible for compliance with the law. Efforts must be made to become familiar with the law and to keep current with new developments. Libraries and school districts should have a written copyright policy, modified as court cases are decided.

Included in the handbook are a general overview of copyright, specific information on videotape and microcomputer software, suggestions for developing a policy and writing for permission, questions about copyright asked by Kansas librarians, and an annotated bibliography. We hope that this handbook will give librarians a place to start when confronting copyright and videotape or microcomputer software questions in their library.

DISCLAIMER

The opinions contained herein reflect the authors' informed opinions, but do not constitute legal advice.

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1. THE COPYRIGHT LAW

Rights Granted to Copyright Holders

The law governing use of videotapes and microcomputer software derives from the U. S. Copyright Act, found in Title 17 of the United States Code. The copyright law attempts to encourage creative endeavor by prohibiting uses that deprive the creator of the work of income or some aspect of ownership. At the same time, the copyright law attempts to define legitimate uses of the work for the public.

Copyright does not protect every endeavor. Certain requirements must be met. First, a work must be in a tangible form that is capable of being copied. Ideas cannot be copyrighted. Also, a work must be original before it can be copyrighted. It must be a work of "authorship", or one that owes its origin to a creator or originator.

If these requirements are met, then copyright attaches to the work, and the copyright law reserves to the creator a set of rights. Specifically what these rights are depends upon the type of work it is: literary, dramatic, graphic, musical, audiovisual, or machine-readable data. Copyrights are registered with the Copyright Office of the Library of Congress in Washington, D.C., but a copyright need not be registered for a creator's rights to attach. The creator must register the copyright, however, before he or she asserts those rights in some way, either by publishing a work that he does not intend to enter into public domain or by using the courts to enforce those rights. Under the current copyright law, which went into effect in 1978, a copyright lasts for the duration of the creator's life, plus fifty years. For works protected under the old copyright law, copyright generally lasted for 28 years, and could then be renewed for another 28 years.

Section 106 of the copyright law defines the rights given to the author or creator of an original work:

> **§106. Exclusive rights in copyrighted works**
>
> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phono records;
> (2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phono records of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Section 106 reserves to the owner of the copyright such rights as the making of reproductions, copies, or photocopies of a work, and the distribution of those copies except under specific circumstances. Also prohibited is the public performance of works subject to copyright. Because the rights enumerated in this section are reserved to the copyright holder, others are prohibited from exercising them without his or her express permission.

Rights Granted to Libraries

The purpose of granting an author or creator the rights enumerated above is to encourage his or her work by insuring that he or she will benefit from any income that might be derived from it; by granting control over how a work is to be used; and to insure that others cannot claim the work as their own. In addition to recognizing the rights of creators, the copyright law also recognizes and protects the rights of the public, including libraries, in the use and ownership of artistic works.

Rights given to the public in using a work are stated in section 107 of the copyright law. These rights also apply to libraries.

§107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phono records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fair use of a copyrighted work is not a violation of the copyright law. Under fair use, a user may review or publicly comment on a copyrighted work. Fair use also allows for the reproduction of a work under limited circumstances, such as using short quotations in comment of a work or the accidental display of a work located at the scene of a reported event.

Fair use recognizes the educational value of copyrighted works, and allows for use of these works under specific circumstances in a non-profit educational setting. Except under specific circumstances, making a copy of an entire work or showing a work to the public would normally be considered in violation of the copyright law, and contrary to fair use.

In addition to rights given the public and libraries under fair use, libraries in particular are granted specific rights to copy and distribute materials under section 108 of the copyright law. Under proper circumstances, libraries may make a copy of certain works for the purpose of preserving or replacing damaged or lost items.

On request, a library can also reproduce and give to a patron a copy of a work so long as the copy becomes the property of the patron, displays a warning of copyright, and the library has no notice that the copy will be used for any purpose other than private study, scholarship, or research.

Libraries may loan videotapes for home use without violating copyright because §109(a) conveys rights in the use of a specific copy to one who lawfully obtains that copy:

§109. Limitations on exclusive rights: Effect of transfer of particular copy or phono record

(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phono record lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phono record.

Court Interpretation of the Copyright Law

How the written law applies to everyday situations is determined in court. When a copyright holder and a member of the public have a dispute as to what is a proper use of copyrighted material, the court interprets statutory law and rules on the use.

Courts look to precedent established in earlier cases with similar legal issues and fact patterns in deciding the current action. The public can then rely upon the court rulings in determining whether or not the same use would be legal in future situations. The problem is that there are virtually no court decisions involving libraries in copyright disputes.

The most important decision, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) determined that home videotaping of over-the-air programming does not violate copyright.

Encyclopaedia Britannica v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1978); 558 F. Supp. 1247 (W.D.N.Y. 1983) involved the systematic and large-scale copying and reproduction of off-the-air programs by a school media service for classroom use. The court examined four factors in determining that temporary use of the videotapes in question was not proper:

1) The purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2) The nature of the copyrighted work;
3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4) The effect of the use upon the potential market for or value of the copyrighted work.

In considering these factors, the court found that the tapes in question were available for purchase and for lease on a temporary basis. The copying and distribution of the programs therefore interfered with the rental market of their programs. The court did not consider the educational nature of the use nor the convenience of time-shifting to be sufficient to substantiate the use under fair use. Although the court does not claim that temporary use by an educational institution of off-air videotape recordings is entirely prohibited, the Crooks decision has a chilling effect on all such activity.

> It should be stressed that this determination affects on the defendants' practice of copying plaintiffs' copyrighted and televised works. Although the court finds that limited temporary use does not apply to plaintiffs' televised works in this instance, the court is aware that there are many different off-the-air rerecord rights attached to the many different kinds of programs broadcast by television stations. The court's finding that defendants' request for temporary use is not fair use of plaintiffs' works is intended only to affect the parties in this case and is based solely on the law and the facts as presented in the instant action.

558 F. Supp., at 1251.

Because other issues of concern to libraries' use of microcomputer software and videotapes have not been addressed by the courts, libraries are uncertain specifically how the law should apply. It is clear, for example, that a library may check out films and videotapes for private viewing by individual patrons. It is also clear that a library may not show the same videotape or film to a group of patrons in its auditorium, since this would infringe upon the copyright holder's exclusive right of public performance.

Would the viewing of a copyrighted videotape by an individual patron in a carrel equipped with a television monitor and a video recorder and situated in a public area of the library also violate the copyright holder's rights, or would it be upheld as the patron's fair use right to preview material? This is one of many "gray areas" of the law that remain unanswered because the courts have not addressed them. Because they have not been addressed, libraries cannot be assured of protection from liability in many instances unless they take a conservative approach to copyright issues.

2. LIBRARY POLICY

An article in the journal Library Trends (vol. 32, no. 2, Summer, 1983, pp. 218-19) lists several techniques libraries can employ to avoid copyright liability. Following are some suggestions from the article:

--Make one person on the library staff responsible for copyright issues in the library. That staff member should maintain close contact with personnel whose duties present sensitive copyright issues, such as interlibrary loan librarian, fine arts or audio-visual librarian, the staff members responsible for processing and checking out computer software, and circulation personnel.

--Have written policies and procedures for using videotapes, microcomputers, and for other copyright sensitive library functions. Include sample permission request letters. (See p. 18 for suggestions for developing a copyright policy.)

--If your library owns the United States Code, know how to find applicable sections within Title 17. If you do not own the Code, keep a photocopy of the copyright law in a reference file. You may also wish to consider keeping current articles relevant to your collection pertaining to copyright in the folder.

--If your library conducts staff development training, you may want to consider copyright as a topic for a workshop.

3. REMEDIES: WHAT IF YOUR LIBRARY IS SUED?

What can happen if your library has been challenged for infringing the copyright law? A library may be responsible for the acts done by its employees in the course of their employment. In addition, a library can be said to have contributorily infringed the copyright law if it is in a position to control the use of copyright protected material by others and if it authorized an infringing use without permission of the copyright holder. Both the library and employees as individuals can be named as defendants in a copyright infringement suit.

Normally, a copyright suit can only be brought after the work in question has been registered with the Copyright Office of the Library of Congress. A copyright suit must be brought within three years of the alleged violation. If an infringement is found to have occurred, one or more of the following remedies may be granted to the copyright holder.

At the commencement of the suit, but before the termination of the suit, a court may grant a temporary injunction. This is a court order that the activity alleged to be in violation of the copyright law be ceased until a final determination is made. In considering a temporary injunction, the court will look at the strength of the evidence that an infringement did indeed occur, and also the extent of the commercial harm that may be caused to the copyright holder if the activity is allowed to continue. At the end of the suit, if the activity is determined to be an actual infringement, the court may grant a permanent injunction ordering that the activity be ceased permanently.

In addition to injunctions, money damages may be awarded to the copyright holder. Actual damages may be granted if the extent of the copyright holder's commercial loss can be determined.

Many times it is difficult to determine the exact extent of the copyright holder's monetary loss. In these instances, the court may award statutory damages instead of actual damages. Statutory damages are prescribed by §504(c) of the copyright law. The law provides that for the copyright infringement of any one work, the court at its discretion may award any amount between $250 and $10,000. If it can be proven that the infringement was willful, that is, if the infringing activity was undertaken knowing that it was a copyright violation, then the court may award the copyright holder up to $50,000. If the infringing party can prove to the court that it was unaware that the activity violated copyright law and that it had no reason to believe that it was violating copyright law, then the court at its discretion may reduce the statutory award to as little as $100.

Under §504(c)(i) of the copyright law, if an individual is found to have infringed the copyright in the course of his or her employment, and that individual is an employee of a nonprofit educational institution, library, or archive, and the activity involved was reproducing materials, then the court may elect not to award statutory damages if the individual had reason to believe that his or her activity was not an infringement. This section applies to the library, educational institution, or archive itself as well as to the individual employee.

In addition to injunctions and actual or statutory damages, a library may be liable for opponent's attorneys fees if the opponent prevails. Library administration also needs to bear in mind the cost of its own attorney in defending the action.

4. MICROCOMPUTER SOFTWARE

Information in the form of computer data and programs written on magnetic media such as floppy diskettes are subject to copyright provisions. In addition, most computer programs are also subject to contract provisions set out in a license agreement that usually accompanies the software. License agreements are sometimes called "shrink wrap" agreements, because they are typically packaged just inside clear plastic wrapping that must be broken in order to use the software.

"Shrink Wrap" License Agreements

Shrink wrap agreements usually provide that ownership of the software package is never actually transferred to the buyer, but instead the buyer is just leasing the software for his or her use. In addition, the license agreement usually dictates the conditions under which copies of the software may be made. Shrink wrap license agreements normally provide that by breaking the plastic wrap surrounding the software, the user agrees to abide by the terms of the agreement.

Some states have passed legislation validating shrink wrap provisions. Whether the license agreements would be upheld in court is not now known. A Louisiana court recently held that its own state shrink wrap law is preempted by federal copyright law, and is thus invalid. (Vault Corp. v. Quaid Software Limited, 655 F. Supp. 750 (D. La. 1987)). Some legal experts have argued that the license agreements are invalid because the contractual provisions within the licenses have not been bargained for, and thus the contracts cannot be binding upon users. Because the courts have not specifically addressed this issue, libraries would be wise to conduct themselves as though the license agreements are binding and their provisions valid. To do otherwise would be to assume possible copyright or contractual liability.

Archival Copies of Programs

Commercial vendors normally restrict the reproduction of software diskettes to archival disks. Programs guarded by copy protection schemes usually either provide a second copy at the time of purchase, or will send a second, protected copy when the software is registered. When a user is allowed to make his own archival disks, the license agreement generally allows only for one or perhaps two archival copies to be made. Users are also given the right to make an archival copy of a computer program by §117(2) of the copyright law. The working diskette is intended to be used much like a book, in that it may be lent or given to others to use, but it is only to be used on one computer at a time unless permission is obtained.

Users are generally not allowed to use diskettes concurrently on more than one computer, nor are they allowed to install the software on a fixed disk and use the diskette elsewhere, nor install the software on more than one machine equipped with a fixed disk. The archival copies are normally intended to be just that--a backup in case of the failure of the working diskette.

Neither the license agreements nor the copyright law would allow a user to consider the archival diskette as a second copy to be used concurrently with the working copy. Libraries can normally use archival copies to replace the working copy if it should become damaged or destroyed.

Licensing agreements for the type of software referred to as "shareware" normally provide that copies may be freely made and shared with other users, providing that the software program has not been altered and that no profit beyond the cost of materials is charged for the program. In addition, shareware vendors usually ask that a registration fee be sent to them if the end user decides to use the software. Otherwise, use of shareware is subject to the constraints of the copyright law.

Whenever a library purchases software, especially software intended for loan to patrons, the license agreement should be read before the package is opened to be sure that library policies, procedures, and intended use will not violate the agreement.

Suggestions for Avoiding Copyright Liability With Microcomputer Software

1. KEEP SOFTWARE PROGRAMS IN A RESTRICTED AREA. Provide access to titles through the card catalog or a separately-compiled listing, but do not keep programs where patrons may have unsupervised access to them.

2. MAINTAIN AN EFFECTIVE CHECK-OUT PROCEDURE. Be sure that staff members carefully check out each package for patron use. This may help to impress upon the patron his or her responsibility for the software.

3. DO NOT CHECK SOFTWARE OUT FOR USE OFF-PREMISES. Patrons may be more reluctant to make illicit copies under the watchful eye of a librarian than they would at home.

4. HAVE A WRITTEN POLICY STATING THAT THE LIBRARY DOES NOT ALLOW THE DUPLICATION OF COPYRIGHTED PROGRAMS. Do not check programs out to anyone who has expressed an intention to copy them.

5. MAKE PUBLIC DOMAIN AND SHAREWARE PROGRAMS AVAILABLE FOR USE. Patrons may be less tempted to make illicit copies if there are programs available that they may legitimately copy. Be sure that the library has registered its own copies of shareware programs.

6. POST A COPYRIGHT NOTICE SIGN WHERE SOFTWARE IS STORED AND USED. Use wording similar to the signs posted at unsupervised photocopy machines to notify patrons that they are responsible for complying with copyright provisions.

7. AFFIX A COPYRIGHT NOTICE OR LICENSING AGREEMENT TO EACH PACKAGE IN A PROMINENT PLACE. If software is kept in a media box, tape a photocopy of the licensing agreement on the outside of the box. Otherwise, tape it to the inside front cover of the documentation binder, or in any other place where it may be plainly seen by the patron.

8. MAKE NO MORE ARCHIVAL COPIES OF DISKETTES THAN ARE ALLOWED BY THE LICENSING AGREEMENT. For most programs, this means one copy of each diskette supplied by the vendor. A few vendors allow one archival copy and one back-up copy.

9. STORE ARCHIVAL DISKETTES WHERE THEY WILL NOT BE USED. Don't be tempted to use archival diskettes as a second working copy of the program.

10. PRINT A COPYRIGHT NOTICE ON THE LABEL OF EACH WORKING COPY OF A DISKETTE. This includes the letter "c" with a circle around it, the date of copyright, and the name of the copyright holder. You should be able to find this on each of the original diskettes.

5. VIDEOTAPES

Performances of Commercial Videotapes

In general, videotapes cannot be shown in public because it violates the right reserved to the copyright holder to publicly perform his work. (Refer to §106(4) above, at pp. 1-2.) There are two major exceptions to this. One is that individuals may view videotapes at home for non-commercial purposes. The copyright law at §101 defines a public performance as follows:

> To perform or display a work "publicly" means--
> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; . . .

Thus, two factors determine whether a performance is public. One is whether the performance is given in a public place. The other is who the persons are who are present at the performance, regardless of where it is given. It is anticipated that family members or friends might be present at a non-commercial showing of a videotape or film at home, and according to the copyright law, this does not constitute an infringement. An organization may not meet in a private home or in a public place, however, and show a copyrighted videotape to the group without permission.

Many of the videotapes purchased by libraries display a notice that the tape is intended for home use only, and that any public performance or any other use is prohibited. This notice does not invalidate a library's statutory right to lend a copy of the videotape that it has purchased or otherwise legally obtained. (See the discussion of §109(a) at p. 3 above.)

It has not been determined by the courts whether a copyrighted videotape may be viewed by individuals in a carrel within the library, or within a private viewing room within the library. Two decisions have held that viewing copyrighted videotapes in private rooms within a place open to the public violates copyright law, but both of the decisions involved commercial transactions where the infringer was profiting from the performance (Columbia Pictures Industries, Inc. v. Aveco, 800 F.2d 59 (3rd Cir. 1986); Columbia Pictures Industries, Inc. v. Redd Horne, 749 F.2d 154 (3rd Cir. 1984)). Libraries wishing to avoid copyright liability will consult with an attorney or avoid allowing patrons to view copyrighted videotapes on the premises.

The other exception to the copyright holder's exclusive right to public performance is the classroom use exception granted by §110(1):

> **§110. Limitations on exclusive rights: Exemption of certain performances and displays**
>
> Notwithstanding the provisions of section 106, the following are not infringements of copyright:
> (1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audio-visual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;. . .

Clearly, films and tapes may be shown to students within a class in a public or private nonprofit school. They may also be shown to students who are members of a class within a school library. Showing films and videotapes to students not within the same class, or for some purpose other than a teaching activity, such as for entertainment, may violate copyright law, however. This exception does not apply to all instances in which a film or tape is shown within a school, nor does it apply to videotapes that have been obtained by some illegal means, such as an illicit reproduction.

Other types of libraries, such as public libraries, may also be considered places "devoted to instruction". The question arises whether videotapes may be shown to classes meeting within the library. Where the performance falls within the requirements of §110(1), and the videotape is being shown in connection with a face-to-face teaching activity by an instructor or student within a class, and the performance is not open to the general public, then it may fall within the exception. Again, the provision that the videotape be one that was obtained by legal means applies.

Off-Air Recording by Educators

The U. S. Supreme Court's decision in Encyclopaedia Britannica v. Crooks (see pp. 4-5 above) leaves some doubt as to what extent educators may tape programs off the air for later classroom use.

In 1981, representatives of education organizations, copyright proprietors, and creative guilds and unions developed "Guidelines for Off-Air Taping of Broadcast Television Programs" (see Appendix B), which purports to establish fair use guidelines under which off-air taping is permissible. While not legally binding upon the courts, these Guidelines are at least an expression of agreement among principals likely to be involved in litigation.

The Guidelines provide for the taping of programming at the request of an individual teacher for use within 45 calendar days after the recording. Tapes may be shown to students during the first ten school days after recording. Thereafter, tapes may only be used for review purposes. Tapes may not be made in anticipation of possible use, as in the Crooks case, but must be made in response to a request by an educator. The tape must be erased at the end of the 45 day period. For other requirements of off-air taping, refer to the Guidelines.

The most conservative approach would be to refrain from off-air taping until the courts have ruled on fair use. Because representatives of copyright holders participated in developing the Guidelines, it would probably be safe to incorporate them into the off-air taping policy of a school district. The district's counsel should be consulted in developing a written policy.

Suggestions for Avoiding Copyright Liability With Videotapes

1. DEVELOP A WRITTEN POLICY ON CIRCULATING VIDEOTAPES. The policy should prohibit the showing of videotapes by groups without written permission and the reproduction of videotapes.

2. DON'T REPRESENT THAT YOUR VIDEOTAPES ARE AVAILABLE FOR USE BY GROUPS AND ORGANIZATIONS. Don't send listings of tapes owned by the library to groups. Staff members should be instructed how to answer inquiries about the availability of tapes for groups.

3. DO NOT ALLOW GROUPS TO SHOW COPYRIGHTED VIDEOTAPES WITHIN LIBRARY FACILITIES unless they meet the classroom use exception granted by §110(1).

4. REQUIRE WRITTEN PERMISSION FROM THE COPYRIGHT HOLDER TO ALLOW USE OF A VIDEOTAPE BY GROUPS. Keep a sample letter that the group may use. Keep a copy of the letter on file while the tape is in use.

5. DO NOT REPRODUCE COPYRIGHTED VIDEOTAPES WITHOUT WRITTEN PERMISSION.

6. A SIGN LOCATED AT THE VIDEOTAPE COLLECTION OR A USER'S AGREEMENT SIGNED BY PATRONS SHOULD BE USED to notify patrons that videotapes are subject to copyright law, that they are intended for home use only, and that the patron assumes liability for copyright infringement.

7. LIBRARIES SHOULD NOT VIDEOTAPE TELEVISED PROGRAMS except in compliance with the Guidelines defining educational fair use (see Appendix B).

QUESTIONS ABOUT COPYRIGHT BEING ASKED BY KANSAS LIBRARIANS

VIDEOTAPES

Q: Can I show videotapes to groups in the library?

A: Probably not without written permission from the copyright holder. First, determine if the videotape is protected by copyright. If it displays a copyright notice or if it is being sold commercially, it is likely covered by copyright law. If in doubt, it is safest not to show the videotape. Display of a videotape protected by copyright violates the right of public performance reserved to the copyright holder by federal law.

Q: Can I check out videotapes to a teacher to show in his or her classroom?

A: It depends upon how your videotape was obtained. If you legally obtained a commercially-available tape, it may be shown subject to the requirements of 17 U.S.C. §110(1). That is, it may be shown in the classroom or in the library by the instructor or by a student as a part of a teaching activity. It may not be used for recreational purposes. If the videotape is of a program taped off-air within the last ten school days at the specific request of the instructor showing the tape, then it may also be shown. If the tape is a reproduction made without permission, or if it is a program taped off-air not at the request of the teacher wishing to show it, then it should not be shown within the classroom.

Q: Can I publicize our videotape collection to organizations to use for programs?

A: It would probably not be a good idea. Public performance of copyright-protected videotapes is a right reserved to the copyright holder. For the library to imply that its videotapes subject to copyright are available for public performances without permission from the copyright holder would expose the library to liability as a contributory infringer. In the Sony case cited above, the Supreme Court held that a contributory infringer is one who "was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner." The library should only allow organizations to use the videotapes if the organization has obtained written permission to do so from the copyright holder.

Q: What should I do if a patron tells me he or she is going to make a copy of a library videotape?

A: Assuming that the videotape is protected by copyright, the patron's reproduction of the tape would be illegal. The library may be a contributory infringer if it allows the patron to take the videotape with knowledge of his or her intention. The surest way to avoid liability is to explain the problem to the patron and then refuse to check out the videotape. Your library should support this with a written policy that prohibits the duplication of videotapes subject to copyright law.

Q: Can I charge a fee to persons checking out videotapes and VCR's?

A: There is no copyright problem with charging a fee to patrons checking out VCR's. Under §109, a lawful owner of a videotape is free to sell, lease, or lend that cassette to others. The library may also bill patrons for the cost of replacement if the videotape is returned damaged.

Q: Can I check out videotapes only to patrons 18 or older?

A: If you wish. This is not a copyright problem, but rather a matter of library policy.

Q: Can I make a back-up of a videotape in case the original gets damaged?

A: You may not make a copy of a videotape that is protected by copyright law in anticipation of damage. If your copy of the videotape is damaged, lost, or stolen, and you have made a reasonable effort to replace it and were unable to find a replacement copy at a fair price, then you may make a copy from another under Fair Use.

Q: What should I do if I buy a videotape for the library and inside find a label prohibiting library circulation?

A: §109 of the copyright law grants the right to sell, rent, or distribute a videotape that has been legally obtained. The copyright holder may not reserve that right by using such a notice. The library may circulate the videotape for home use.

Q: How can I get public performance permission for a videotape?

A: Have the group or organization wishing to show the videotape write a letter to the copyright owner asking permission to perform it. The letter might contain such information as what group will see it, what date and time it will be shown, at what location it will be shown, at how many performances the group wishes to show it, and who owns the copy the group wants to use. Libraries should not agree to allow a videotape to be shown by a group until they have in writing affirmation that permission has been granted.

MICROCOMPUTER SOFTWARE

Q: Can I make a back-up copy of microcomputer software in case the original gets damaged?

A: If the software is copy-protected, the vendor usually provides a back-up copy. If it is not copy-protected, the license agreement normally provides that the user may make one or two back-up copies. These copies must usually be stored, and cannot be regarded as another working copy, or used concurrently with working copies.

Q: Can I run a computer program on a Local Area Network so several students can use it at the same time?

A: In most cases, no. Most commercial vendors sell multi-user versions of their software programs that are intended for use on a local area network (LAN). They usually cost more than the version intended for single users. Sometimes vendors will sell a site license so that the program may be used on a number of different machines owned by the organization. There is usually a higher cost for this arrangement. Unless you have purchased one of these arrangements, chances are good that the license agreement for your program provides that the package may only be used on one machine at a time. This would prohibit loading it onto an LAN.

Q: Can I send an example of a workbook page over our school's electronic mail system?

A: Some instances of limited copying from workbooks may be permitted under Fair Use, however the nature of electronic mail may stretch the intended purpose of Fair Use. Rights reserved to copyright holders that may be affected are the right to distribute copies of a work to the public and the right to display the copyrighted work publicly.

Q: Can students make copies of software they use at school for their home computers?

A: If the software is public domain or shareware, they may. The license agreement for most commercially marketed software usually prohibits copying activity of this type, however. Normally, students may not make copies of the library's software programs for home use.

Q: How can I prevent illegal copying of software on our library's public access microcomputers?

A: It is doubtful that you can prevent illicit copying of software altogether. The best you can do is to limit your library's liability for illegal copying by taking every reasonable measure to discourage this activity. You should not allow a patron to use software programs whenever you have knowledge that they are being illegally copied. See p. 9 above for some suggestions regarding this.

Q: Are my rights under a software leasing arrangement different than if I purchase the program outright?

A: They may be. It would be very difficult to be specific as to exactly what your rights are without examining your lease agreement. Because you are not the owner of the software, you may not be able to make it available for student use, since §109 only conveys this right to the lawful owner of the material. Of course, you would probably not be able to sell or give the program away, either. Questions regarding permissible uses and your rights should be referred to your leasing agent. When you lease software, you should be explicit about what uses you plan to make of the software program.

SUGGESTIONS FOR DEVELOPING A COPYRIGHT POLICY

In the public library and in many school districts the library media professional will have the responsibility for enforcing copyright provisions. A formal written copyright policy, adopted by the proper governing body, will provide that individual with the needed authority to carry out established guidelines. As Helen Adams states in School Media Policy Development: "Written policies are a valuable record of past decisions and an equally valuable guide for future actions...if properly followed, written policies and the accompanying rules and/or procedures ensure consistency." (Adams, p.1)

Adams and Vlcek (see bibliography) suggest that the following recommendations be considered for inclusion in a copyright policy:

--It is the governing bodies' policy to abide by the copyright law.

--Written permission of the owner is required for use or duplication of copyrighted materials, except when allowed by the copyright law, fair use guidelines, license agreements, or proprietor's permission.

--Employees or patrons violating the copyright law are liable for their own actions.

--Use of library or district equipment that would prevent sale of copyrighted materials is prohibited.

-- "Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes," will be followed when taping any program for school use. (See Appendix B)

--Appropriate notices will be placed on or near all equipment capable of copying various media.

--Appropriate copyright records will be maintained.

--One person will be designated as copyright officer for the institution.

--A copyright manual will be developed and maintained.

--The policy will be reviewed and updated to remain current with the copyright law.

It would also be helpful to provide examples of permission letters and any other record-keeping forms that will be necessary. Lastly, the policy should be reviewed by the library's or district's legal counsel.

WRITING FOR PERMISSION FOR CIRCUMSTANCES BEYOND FAIR USE

If you find yourself needing to go beyond the provisions of fair use or the classroom teaching exemption for copyrighted materials, the copyright holder's permission should be sought. When requesting permission, the following should be kept in mind:

1) Use a letter to request permission and mail it with adequate time allowed for the copyright holder to respond. If you should seek permission by telephone, always follow it up with a written request confirming your conversation.

2) Include complete information about the material to be used.

3) If requesting permission to duplicate, specify the portion of the work to be copied, the type of reproduction, the number of copies, and the use and distribution of those copies.

4) If requesting permission to display or perform the work publicly, include the date of the performance, the portion of the work to be displayed, the number in and nature of the audience, and the reason for a public performance.

5) Include a space for the copyright holder's representative to sign and date their approval and to specify any conditions that would apply to their materials' use. Also enclose a self-addressed, stamped envelope for their reply.

SAMPLE PERMISSION LETTER

3 February 198X

Permissions Office
Magic Lantern Films, Inc.
12345 Showbiz Road
Movietown, CA 98765

Dear Sir/Madam:

I would like to request permission to use a brief excerpt from one of your films in an orientation videotape for our reference department. The material and its proposed use are described below:

Title: Help! I Got Locked in the Library! (1985; color; 76 minutes)

Excerpt to be used: From approximately 16 minutes to approximately 18.5 minutes (scene in which Hilary is running between stacks being pursued by a book cart)

Type of reproduction: 1/2" videocassette

Number of copies: One copy will be made

Use to be made of copy: Clip will appear in a 15-minute orientation videotape for use with six junior high school classes visiting the library for the first time. The excerpt is an excellent, humorous illustration of the feeling of helplessness that comes from not knowing how to use the library effectively.

Distribution of copy: The tape will be used only in the library, and will be erased once all six classes have viewed it.

We would like to begin production of our videotape on 1 April 198X, and it will be used between 1-15 September 198X. I would appreciate hearing from you before that date. A stamped, self-addressed envelope is enclosed for your reply. Thank you for considering our request.

Sincerely yours,

B. B. Lographic, Instructional Librarian
Miniopolis Public Library

Permission granted _____ Date _____
(Signature)

Conditions that apply to this use: _____

_____

1987 Statement on Software Copyright
An ICCE Policy Statement

Permission to reprint all or part of this document is granted. Please acknowledge the ICCE Software Copyright Committee.

Background

During 1982-83, educators, software developers, and hardware and software vendors cooperated to develop the **ICCE Policy Statement on Network and Multiple Machine Software.** This Policy Statement was adopted by the Board of Directors of the International Council for Computers in Education (ICCE) in 1983, and was published and distributed. It has received support from hardware and software vendors, industry associations and other education associations. One component of the Policy Statement, the "Model District Policy on Software Copyright," has been adopted by school districts throughout the world.

Now, three years later, as the educational computer market has changed and the software market has matured, ICCE has responded to suggestions that the policy statement be reviewed by a new committee and revisions be made to reflect the changes that have taken place both in the marketplace and in the schools.

The 1986-87 ICCE Software Copyright Committee is composed of educators, industry associations, hardware vendors, software developers and vendors, and lawyers. All the participants of this new Committee agree that the educational market should be served by developers and preserved by educators. To do so requires that the ICCE Policy Statement be revisited every few years while the industry and the use of computers in education are still developing.

Responsibilities

In the previous Policy Statement, lists of responsibilities were assigned to appropriate groups: educators; hardware vendors; and software developers and vendors. The suggestion that school boards show their responsibility by approving a district copyright policy was met with enthusiasm, and many districts approved a policy based on the ICCE Model Policy. The suggestion that software vendors adopt multiple-copy discounts and offer lab packs to schools was likewise well received; many educational software publishers now offer such pricing. It is therefore the opinion of this committee that, for the most part, the 1983 list of recommendations has become a *fait accompli* within the industry, and to repeat it here would be an unnecessary redundancy.

Nevertheless, the Committee does suggest that all parties involved in the educational computing market be aware of what the other parties are doing to preserve this market, and that the following three recommendations be considered for adoption by the appropriate agencies.

School District Copyright Policy

The Committee recommends that school districts approve a District Copyright Policy that includes both computer software and other media. A Model District Policy on Software Copyright is enclosed.

Particular attention should be directed to item five, recommending that *only one* person in the district be given the authority to sign software licensing agreements. This implies that such a person should become familiar with licensing and purchasing rights of all copyrighted materials.

Suggested Software Use Guidelines

In the absence of clear legislation, legal opinion or case law, it is suggested that school districts adopt the enclosed Suggested Software Use Guidelines as guidelines for software use within the district. The recommendation of Guidelines is similar to the situation currently used by many education agencies for off-air video recording. While these Guidelines do not carry the force of law, they do represent the collected opinion on fair software use for nonprofit education agencies from a variety of experts in the software copyright field.

Copyright Page Recommendations

The Committee recommends that educators look to the copyright page of software documentation to find their rights, obligations and license restrictions regarding an individual piece of software.

The Committee also suggests that software publishers use the documentation copyright page to *clearly* delineate the users' (owners' or licensees') rights in at least these five areas:

1. How is a back-up copy made or obtained, how many are allowed, and how are the back-ups to be used (e.g., *not* to be used on a second machine at the same time)?
2. Is it permissible to load the disk(s) into multiple computers for use at the same time?
3. Is it permissible to use the software on a local area network, and will the company support such use? Or is a network version available from the publisher?
4. Are lab packs or quantity discounts available from the publisher?
5. Is it permissible for the owner or licensee to make copies of the printed documentation? Or are additional copies available, and how?

ICCE—Suggested Software Use Guidelines

The 1976 U.S. Copyright Act and its 1980 Amendments remain vague in some areas of software use and its application to education. Where the law itself is vague, software licenses tend to be much more specific. It is therefore imperative that educators read the software's copyright page and understand the licensing restrictions printed there. If these uses are not addressed, the following Guidelines are recommended.

These Guidelines do not have the force of law, but they do represent the collected opinion on fair software use by nonprofit educational agencies from a variety of experts in the software copyright field.

Back-up Copy: The Copyright Act is clear in permitting the owner of software a back-up copy of the software to be held for use as an archival copy in the event the original disk fails to function. Such back-up copies are not to be used on a second computer at the same time the original is in use.

Multiple-loading: The Copyright Act is most unclear as it applies to loading the contents of one disk into multiple computers for use at the same time. In the absence of a license expressly permitting the user to load the contents of one disk into many computers for use at the same time, it is suggested that you *not* allow this activity to take place. The fact that you physically can do so is irrelevant. In an effort to make it easier for schools to buy software for each computer station, many software publishers offer lab packs and other quantity buying incentives. Contact individual publishers for details.

Local Area Network Software Use: It is suggested that before placing a software program on a local area network or disk-sharing system for use by multiple users at the same time, you obtain a written license agreement from the copyright holder giving you permission to do so. The fact that you are able to physically load the program on the network is, again, irrelevant. You should obtain a license permitting you to do so before you act.

Model District Policy on Software Copyright

It is the intent of [district] to adhere to the provisions of copyright laws in the area of microcomputer software. It is also the intent of the district to comply with the license agreements and/or policy statements contained in the software packages used in the district. In circumstances where the interpretation of the copyright law is ambiguous, the district shall look to the applicable license agreement to determine appropriate use of the software [or the district will abide by the approved Software Use Guidelines].

We recognize that computer software piracy is a major problem for the industry and that violations of copyright laws contribute to higher costs and greater efforts to prevent copying and/or lessen incentives for the development of effective educational uses of microcomputers. Therefore, in an effort to discourage violation of copyright laws and to prevent such illegal activities:

1. The ethical and practical implications of software piracy will be taught to educators and school children in all schools in the district (e.g., covered in fifth grade social studies classes).
2. District employees will be informed that they are expected to adhere to section 117 of the 1976 Copyright Act as amended in 1980, governing the use of software (e.g., each building principal will devote one faculty meeting to the subject each year).
3. When permission is obtained from the copyright holder to use software on a disk-sharing system, efforts will be made to secure this software from copying.
4. Under no circumstances shall illegal copies of copyrighted software be made or used on school equipment.
5. [Name or job title] of this school district is designated as the only individual who may sign license agreements for software for schools in the district. Each school using licensed software should have a signed copy of the software agreement.
6. The principal at each school site is responsible for establishing practices which will enforce this district copyright policy at the school level.

The Board of Directors of the International Council for Computers in Education approved this policy statement January, 1987. The members of the 1986 ICCE Software Copyright Committee are:

Sueann Ambron, American Association of Publishers
Gary Becker, Seminole Co. Public Schools, Florida
Daniel T. Brooks, Cadwalader, Wickersham & Taft
LeRoy Finkel, International Council for Computers in Education
Virginia Helm, Western Illinois University
Kent Kehrberg, Minnesota Educational Computing Corporation
Dan Kunz, Commodore Business Machines
Bodie Marx, Mindscape, Inc.
Kenton Pattie, International Communications Industries Association
Carol Risher, American Association of Publishers
Linda Roberts, US Congress—OTA
Donald A. Ross, Microcomputer Workshops Courseware
Lary Smith, Wayne County Int. Schl. Dist., Michigan
Ken Wasch, Software Publishers Association

For more information write to the ICCE Software Copyright Committee, ICCE, University of Oregon, 1787 Agate St., Eugene, OR 97403.

APPENDIX B

GUIDELINES FOR OFF-AIR TAPING OF BROADCAST TELEVISION PROGRAMS
(From Congressional Record, October 14, 1981)

In March of 1979, Congressman Robert Kastenmeier (R-Wisc.) of the U. S. House Subcommittee on Courts, Civil Liberties and the Administration of Justice appointed a Negotiating Committee consisting of representatives of education organizations, copyright proprietors, and creative guilds and unions.

The guidelines which were developed reflect the Negotiating Committee's consensus as to the application of "fair-use" to the recording, retention and use of television broadcast programs for educational purposes. They specify periods of retention and use of such off-air recordings in classrooms and similar places devoted to instruction and for homebound instruction. The purpose of establishing these guidelines is to provide standards for both owners and users of copyrighted television programs.

They are as follows:

1. The guidelines were developed to apply only to off-air recordings by non-profit educational institutions.

2. A broadcast program may be recorded off-air simultaneously with broadcast transmission (including simultaneous cable retransmission) and retained by a non-profit educational institution for a period not to exceed forty-five (45) calendar days after date of recording. Upon conclusion of such retention period, all off-air recordings must be erased or destroyed immediately. "Broadcast programs" are television programs transmitted by television stations for reception by the general public without charge.

3. Off-air recordings may be used once by individual teachers in the course of relevant teaching activities, and repeated once only when instructional reinforcement is necessary, in classrooms and similar places devoted to instruction within a single building, cluster or campus, as well as in the homes of students receiving formalized home instruction, during the first ten (10) consecutive school days in the forty-five day calendar day retention period.

4. Off-air recordings may be made only at the request of and used by individual teachers, and may not be regularly recorded in anticipation of requests. No broadcast program may be recorded off-air more than once at the request of the same teacher, regardless of the number of times the program may be broadcast.

5. A limited number of copies may be reproduced from each off-air recording to meet the legitimate needs of teachers under these guidelines. Each such additional copy shall be subject to all provisions governing the original recording.

6. After the first ten consecutive school days, off-air recordings may be used up to the end of the forty-five calendar day retention period only for teacher evaluation purposes; i.e., to determine whether or not to include the broadcast program in the teaching curriculum, and may not be used in the recording institution for student exhibition or any other non-evaluation purpose without authorization.

7. Off-air recordings need not be used in their entirety, but the recorded programs may not be altered from their original content. Off-air recordings may not be physically or electronically combined or merged to constitute teaching anthologies or compilations.

8. All copies of off-air recordings must include the copyright notice on the broadcast program as recorded.

9. Educational institutions are expected to establish appropriate control procedures to maintain the integrity of these guidelines.

APPENDIX C

SELECTED BIBLIOGRAPHY ON COPYRIGHT

All of the following are held in Kansas libraries. Consult the Kansas Union Catalog for location information.

OVERVIEWS

Reed, Mary Hutchings. The Copyright Primer for Librarians and Educators. American Library Association, 50 E. Huron St., Chicago, IL 60611. National Education Association, 1201 16th St. N.W., Washington, D.C. 20036. 1987. $7.45.

Describes the copyright law as it applies to various media including videotape and computer software. Gives a short introduction on how the law applies to the area, then provides questions and answers on the use of materials.

Talab, R.S. Commonsense Copyright: A Guide to the New Technologies. McFarland and Co., Inc., Pubs., Box 611, Jefferson, NC 28640. 1986. $14.95.

Intended to clarify statutory law, court cases, and legal opinion on copyright and related legal aspects of print and nonprint acquisition and use. Includes chapters on video and software use and guidelines for computer software. Also includes a bibliography/resource guide to locate additional information.

POLICY DEVELOPMENT

Adams, Helen R. School Media Policy Development: A Practical Process for Small Districts. Libraries Unlimited, Inc., P.O. Box 263, Littleton, CO 80160-0263. 1986. $23.50.

Discusses the development and implementation of various policies of importance to the media center or library. The broad picture presented of the role of the library professional, policy committee, and governing board is of equal value to the public library. Sample policies are included.

Vicek, Charles W. Copyright Policy Development: A Resource Book for Educators. Copyright Information Services, P.O. Box 1460-F, Friday Harbor, WA 98250. 1987. $17.95.

A useful source for all libraries when developing a copyright policy. Includes guidelines for writing and implementing the policy and examples of existing documents. Most importantly, includes a list of consultants available to review copyright policies. Also includes examples of copyright warning notices.

VIDEO AND SOFTWARE

Copyright law: What Every School, College and Public Library Should Know. Videocassette (21 Min.) Association for Information Media and Equipment, 420 Academy Dr., Northbrook, IL 60062.

Addresses copyright concerns specific to prerecorded and off-air taped videotapes. Addressed primarily to school situations and could be used as an in-service program.

Miller, Jerome K. Using Copyrighted Videocassettes in Classrooms and Libraries. Champaign, Copyright Information Services, 1984. o.p.

Limited to discussion of the use of pre-recorded videocassettes, video disks and videotapes. Public library and school issues are discussed. Specific chapters focus on warning and home-use labels.

Using Copyrighted Videocassettes in Classrooms, Libraries and Training Centers, 2nd edition, scheduled for late 1987. Copyright Information Services. P.O. Box 1460-F. Friday Harbor, WA 98250.

Reed, Mary Hutchings and Debra Stanek. "Library and Classroom Use of Copyrighted Videotapes and Computer Software," American Libraries, February 1986, Vol. 17, Pg. 120A-120D. Single copies are available from ALA Office of Rights and Permission, 50 E. Huron Street, Chicago, IL 60611. Include a self-addressed, stamped envelope.

Expresses the opinion of the American Library Association's legal council on library use of copyrighted videotapes and computer software programs. The outline covers use, loan, and duplication of videotapes and software and purchase conditions to aid in avoiding license restrictions on software.

Stanek, Debra J. "Videotapes, Computer Programs and the Library," Information Technology and Libraries, March 1986, Vol. 5, Pg. 42-54.

An expanded version of the previous article in American Libraries. Highlights include the Copyright Law of 1976, library and classroom lending, in-library and in-classroom use of videotapes and computer software.

ADDITIONAL INFORMATION

Johnson, Beda. How To Acquire Legal Copies of Video Programs: Resource Information. Video Resource Enterprise, P.O. Box 191218, San Diego, CA 92119. 1986. $10.00 plus $1.00 for shipping and handling.

Seeks to guide the user in obtaining legal copies of video programs at reasonable or no cost. Includes a list of sources for free programs and programs which can be licensed, a list of recommended resource library components, a flow chart outlining the procedures for obtaining rights, and sample forms.

Miller, Jerome K. The Copyright Directory. Copyright Information Service, P.O. Box 1460-F, Friday Harbor, WA 98250. 1984. $18.00 for nonprofit libraries.

A compilation of sources to contact in order to secure copyright clearance for music, slides, video, motion pictures, sound effects, and still pictures. Also lists associations active in copyright matters.